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2
3 UNITED STATES BANKRUPTCY COURT
4 WESTERN DISTRICT OF WASHINGTON
5

6 In re:

7 RICHARD D. MacGIBBON,
8 Debtor.

No. 05-47976

9 RICHARD D. MacGIBBON,
10 Plaintiff,
11

Adversary No. 07-4024

12 vs.

AMENDED DECISION¹

13 DEBORAH J. MacGIBBON and
14 the STATE OF WASHINGTON,
15 Defendants.

16 As the old colonel said, "Gunslinging is its own reward." The
17 aftermath of the MacGibbon marriage is illustrative of his maxim.

18 The fundamental issue presented is whether a spousal maintenance
19 provision, imposed in a Decree rendered after trial of a contested
20 dissolution of marriage, and which ties one ex-spouse's ongoing support
21 to the other's gross income rather than her actual needs, is "in the
22 nature of alimony, maintenance or support" and thus nondischargeable.

23 I conclude that there is no requirement of actual current need, and
24 considering, first and foremost, the dissolution court's intent, as well
25 as the other customary factors, find the provision is in the nature of
26

27 ¹ Minor clerical changes made. See Notice of Minor Clerical
28 Changes docketed herewith [and corrected as set forth in letter to
publishers dated 29 February 2008].

1 alimony, maintenance and support and thus nondischargeable under
2 § 523(a)(5).²

3 That makes the question of dischargeability under § 523(a)(15)
4 moot, and neither the ex-spouse nor the State violated the automatic
5 stay of § 362 in enforcing, assessing, and collecting support from
6 exempt assets.

8 I. BACKGROUND

9 A. Dissolution:

10 Richard and Deborah MacGibbon were married for approximately
11 20 years and have six children. The dissolution of their
marriage in 2000 followed a 12-day trial.

12 The decree of dissolution orders maintenance based on a
13 formula rather than a fixed sum. Until Richard's 60th birthday
14 in 2009, he must pay Deborah one half of his "gross income
15 from all sources," after deducting child support and income
16 taxes. The maintenance provision specifies a "base rate"
below which maintenance payments may not fall: \$4,000 per
month until 2003, \$5,500 per month until 2006, and \$7,000 per
month until 2009 [("Base Support")]. For the five years after
Richard's 60th birthday, he must pay one-half of his gross
income "generated by his work in the airlines industry."

17
18 In re MacGibbon, 139 Wash. App. 496, 500, 161 P.3d 441 (Wash. App. 2007)
19 (paragraph numbers and footnotes omitted). [Exhibit D-7]

20 As required by Washington law, RCW Chapter 26.09, the decree of
21 dissolution, exhibit P-4, ("Decree") allocates the property and
22 liabilities between the parties, sections 3.2-3.5, includes a hold

23
24 ² Absent contrary indication, all "Code," chapter and section
25 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 prior to
26 its amendment by the Bankruptcy Abuse Prevention and Consumer
27 Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23 ("BAPCPA"), as the
relevant cases were filed before its effective date (generally
17 October 2005). "RCW" references are to the Revised Code of
Washington.

28 "FRBP" references are to the Federal Rules of Bankruptcy
Procedure, and "FRE" references are to the Federal Rules of Evidence.

1 harmless provision in section 3.6, and provides for support and
2 maintenance in section 3.7. The decree is predicated on the dissolution
3 court's findings of fact and conclusions of law, exhibit P-5
4 ("Findings"), wherein maintenance is addressed in section 2.12,
5 extending five and one-half pages. Although no oral ruling transcript
6 is in evidence, and no one testified at trial regarding the provenance
7 of the Findings, which are made on the pleading paper of Ms. MacGibbon's
8 counsel, the extended discussion reads more like the distillation of an
9 oral ruling than typical Washington State Court findings and
10 conclusions.

11 In any event, the Findings are extensive:

12 2.12 MAINTENANCE

13 Maintenance should be ordered for Ms. MacGibbon.

14 The post-dissolution economic position of the parties is of a
15 "paramount concern" to this Court. Ms. MacGibbon is in need
of maintenance.

16 . . .

17 One objective of these proceedings should be to balance
18 equally those changes and adjustments between the parties.
19 Ms. MacGibbon, of necessity, has already begun making
20 adjustments to her lifestyle to accommodate this "downsizing."
However, as the custodial parent of the five minor children,
she will clearly need to receive substantial child support,
property and maintenance.

21 Maintenance is a flexible tool. It provides reasonable
22 assistance to the financially handicapped spouse, by providing
23 money for training or retraining for the future. It also
provides a means of distributing property so as to maintain an
overall fair and equitable standard of living for both
parties.

24 . . .

25 The marriage is of substantial duration and at separation the
26 wife is to all intents and purposes unemployable. The
27 husband's support responsibilities should be long term.

28 . . .

1 Long term awards of maintenance in reasonable amounts should
2 be granted when it is clear, as here, that Ms. MacGibbon will
3 not be able to contribute significantly to her own livelihood.
4 This is, in part, because of the disparity in the parties'
5 respective post-dissolution earning capacity, Ms. MacGibbon's
6 parenting responsibility, and the relatively high standard of
7 living enjoyed during the marriage. Ms. MacGibbon will likely
8 never achieve, even with education and training, the degree of
9 financial independence Mr. MacGibbon can enjoy because of his
10 earning capacity. Ms. MacGibbon forfeited her own economic
11 opportunities, and ability to save for retirement, to be a
homemaker and to enable Mr. MacGibbon to advance in his
career. Ms. MacGibbon was primarily responsible for raising
the parties' six children. Ms. MacGibbon provided the day to
day services needed by the community to function as a family.
She did so at a sacrifice of her economic opportunities in the
marketplace. That trade-off, clearly agreed to by Mr.
MacGibbon, left Ms. MacGibbon economically disadvantaged as
compared to Mr. MacGibbon. Ms. MacGibbon made sacrifices in
order to benefit the community. She should reap her fair
share of any resulting benefit.

12 Ms. MacGibbon's income will never achieve the post-dissolution
13 economic level of Mr. MacGibbon. Therefore, immediate
14 rehabilitation and re-entry into the job market are not
issues, especially in view of Ms. MacGibbon's job experience
and parenting responsibilities.

15 Without appropriate adjustment, Mr. MacGibbon will be able to
16 support a lifestyle more comparable to the lifestyle enjoyed
by the couple during marriage than will Ms. MacGibbon.

17 The above factors warrant a permanent equalization of the
18 parties' adjusted and future standard of living through an
award of property, including maintenance.

19 . . .

20 Mr. MacGibbon, as an increasingly senior pilot for Federal
21 Express, will have an annual gross income of approximately
22 \$180,000. Therefore, he has the ability to pay substantial
maintenance to Ms. MacGibbon. Moreover, his significant
income is likely to continue its 20 year trend over time.

23 Ms. MacGibbon has no income and it will be a long time before
24 she can make any meaningful financial contribution to the
25 upkeep of the family. Childcare and home care are fulltime
26 jobs for Ms. MacGibbon, as they have been over the past 20
years. Her entry level earnings will barely cover child and
home care costs that would be incurred if she went to work
now.

27 Findings, pages 4-7.

1 Section 2.20 of the Findings lays out the financial situations of
2 the parties:

3 2.20 OTHER:

4 Richard MacGibbon is 50 years old and in good health. He
5 began working as a pilot for Flying Tiger Lines in 1974
6 through August 1989, when it merged with Federal Express. He
7 has advanced in his employment to the position of captain. As
8 such, he is qualified to fly B-727 and A-300 airplanes. As a
9 captain, it is estimated his average net salary in 1999,
before voluntary retirement plan deductions, will be about
\$12,200 per month. Mr. MacGibbon's gross income from Federal
Express for 1999 is estimated to be about \$191,000. In
addition, he has rental income that will generate about \$8,000
- 10,000 more each year.

10 . . .

11 Deborah MacGibbon is 47 years old. She was working as an LPN
12 when she met Mr. MacGibbon. After they began living together
13 in 1977, Ms. MacGibbon no longer worked, primarily because Mr.
14 MacGibbon did not want her to, and the parties agreed she
15 would take care of their home and he would earn the family's
16 income. They were married on August 7, 1979. By the time
17 their first child, Dianne, was born in 1980, Ms. MacGibbon's
18 career as a homemaker was established. Her nursing training
is now outdated. The only other formal work experience she
has is that which she acquired when she assisted Mr. MacGibbon
in his operation of a small computer consulting company, R. M.
Enterprises, from their home from 1980 through 1997. That
business is no longer active and Mr. MacGibbon does not intend
to activate it.

19 Ms. MacGibbon has relevant health issues. . . . These
20 health problems are generally under control, but limit Ms.
21 MacGibbon's ability to work outside the home. Over all, Ms.
22 MacGibbon is a healthy and capable woman who, the Court
believes, will improve in health and capability once this
matter is concluded.

23 Ms. MacGibbon has no independent income and no appreciable
24 skills - especially in view of her responsibility to raise
five minor children.

25 . . .

26 There are many basic princip[les] that the Court should
27 consider in making a property division and in providing for
28 maintenance as required by RCW 26.09.080 and RCS 26.09.090.
The court has considered all of the requirements of these
statutes in its rulings and all other legal requirements.

1 Inadequate income is a major cause of harm to children of a
2 divorce. Household income is one of the most important
influences on a child's well-being post-divorce.

3 A basic consideration is the economic disparity between Ms.
4 and Mr. MacGibbon.

5 In conclusion:

- 6 1. This is a long term marriage.
- 7 2. Ms. MacGibbon has a financial interest in Mr. MacGibbon's
8 future earnings because his career and earnings potential
9 were enhanced by virtue of their joint marital
10 partnership decision that Ms. MacGibbon would forgo any
11 career, earnings potential and retirement assets, in
12 order to tend to their family home and six children and
Mr. MacGibbon would be the family bread winner and
provide his wife's future economic security.
- 13 3. The future standards of living and net worth of Ms.
MacGibbon and Mr. MacGibbon should be equalized as much
as possible.

14 Findings, pages 16-19 (some citations omitted).

15 Sections 2.12 and 2.20 of the Findings render unambiguous the
16 dissolution court judge's intent that the provisions be maintenance or
17 support: she was equalizing the post-dissolution disposable income
between the MacGibbons.

18 The Decree provides:

19 3.7 SPOUSAL MAINTENANCE

20 The [debtor] shall pay compensatory maintenance as follows:
21 [Debtor's] gross income from all sources shall be distributed
as follows:

22 First, his required child support shall be paid off the top.

23 Next, he shall pay all required federal income taxes, based on
24 a tax return that follows conventional and Generally Accepted
25 Accounting Princip[les]. All other lawful deductions,
26 exemptions and credits shall be given to Mr. MacGibbon to the
27 maximum value that he can lawfully use them to minimize his
taxes. Any remaining deductions, exemptions or credits, that
are of no value to Mr. MacGibbon in reducing his income taxes,
shall be awarded to Ms. MacGibbon.

28 . . .

1 All of [debtor's] remaining income shall be divided 50/50 with
2 Ms. MacGibbon being awarded 50 percent of such income as
3 maintenance until petitioner's 60th birthday in 2009. Monthly
4 payments of maintenance shall be at the base rate of \$4,000
5 per month to 2003, then the base shall be increased to \$5,500
6 per month to 2006, and then increased to \$7,000 per month
7 until Mr. MacGibbon's 60th birthday in 2009. In any year in
8 which a change in Mr. MacGibbon's income would result in an
adjustment of the base maintenance of 10 percent or more, such
adjustment must be made in May of each year upon Mr.
MacGibbon's prior year's tax return. Make-up payments from
Mr. MacGibbon to Ms. MacGibbon shall be paid in one lump sum
payment before the end of the above May. . . . Mr. MacGibbon
must provide Ms. MacGibbon with a verified copy of his prior
year's annual tax return by the 20th of each April.

9 . . .

10 Any gross income earned by Mr. MacGibbon for five years after
11 [his] 60th birthday, that is generated by his work in the
12 airlines industry, shall be divided 50/50 with Ms. MacGibbon
being awarded 50 percent of such gross income as maintenance.

13 Mr. MacGibbon shall obtain life and disability insurance, with
14 Ms. MacGibbon named as the beneficiary, that will pay Ms.
15 MacGibbon the base maintenance rates, set forth above, to the
16 date of his 60th birthday in 2009. Mr. MacGibbon shall
17 provide to Ms. MacGibbon, on or before 15 days after the
Decree is entered in this matter, and on or before the 15th
day of January 2001 - 2008, proof that this required insurance
has been obtained. If for any reason this insurance is not
obtained, Mr. MacGibbon's unpaid maintenance obligation shall
be a claim against his estate.

18 Maintenance payments shall be made:

19 to the Washington State Support Registry along with child
20 support payments.

21 . . .

22 For convenience, I will refer to debtor's obligations under this
23 provision of the Decree, to the extent they exceed Base Support, as
"Additional Support."

24 The Decree awarded all of the property, community and separate, of
25 both parties, and granted neither party an interest in the property
26 awarded to the other.

27 Returning to the Washington State Court of Appeals's narrative:
28

1 Richard appealed the decree and later appealed several
2 administrative and judicial determinations interpreting and
enforcing the decree. Two of those appeals are relevant here.

3 The first was Richard's appeal to this court of the decree of
4 dissolution. In that appeal, he raised numerous issues
5 including the trial court's division of property, its award of
6 escalating maintenance to Deborah, the order of child support,
7 and the award of substantial attorney fees to Deborah. In
December 2001, this court filed an unpublished opinion,
affirming the trial court in all respects except for a remand
for minor modifications regarding child support.FN5 The
supreme court denied his petition for review.

8 FN5. In re Marriage of MacGibbon, Nos. 46304-7-I,
9 2001 WL 1565599 (Wash. Dec. 10, 2001), review
denied, 148 Wash.2d 1015, 64 P.3d 649 (2003).
10 Linked cases before the same panel dealt with a
trial court finding of contempt by Richard. See
11 Nos. 47672-6-I, 47772-2-I. [Exhibit D-7]

12 While that appeal was pending, Deborah requested assistance
from the Division of Child Support (DCS) of the Department of
13 Social and Health Services in collecting maintenance and child
support from Richard.FN6 DCS commenced administrative
14 proceedings to determine the amount Richard owed as
maintenance for tax year 2000. Following a hearing, an ALJ
15 issued an order assessing \$90,777.55 in additional maintenance
to be paid to Deborah. In calculating the maintenance, the ALJ
16 included \$140,647 in proceeds of Richard's sale in 2000 of
California real property that had been awarded to him in the
17 decree of dissolution. Richard petitioned for judicial review
in King County Superior Court. After a hearing, the superior
18 court affirmed the administrative decision in all respects.
Richard then appealed to this court.

19 FN6. RCW 74.20.040(2). See also 20 Washington
20 Practice, Family and Community Property Law, sec.
36.10, n.1, pp 417-418 ("other definitional
21 provisions make the statute applicable to
maintenance", citing RCWA 74.20A.020(4); RCWA
22 74.20A.020(9), and RCWA 74.20A.020(10)).

23 In that second appeal to this court, Richard argued that the
superior court erroneously interpreted "gross income from all
24 sources" to include income generated from the sale of his
previously awarded separate property (the California real
25 property). According to him, this caused an improper "double
recovery" of marital assets for Deborah that was inconsistent
26 with the decree's stated purpose.FN7 This court affirmed in a
July 2005 unpublished opinion, rejecting Richard's contentions
27 on res judicata grounds. Our court decided that the failure to
challenge in the first appeal the dissolution decree's
28 maintenance formula based on "gross income from all sources"
precluded raising the issue in the second appeal.FN8

1 FN7. In re Marriage of MacGibbon, No. 53981-7-I,
2 slip op. at *5, 128 Wash.App. 1027, 2005 WL
3 1579767, (July 5, 2005). [Exhibit D-8]

4 FN8. Id.

5 Meanwhile, Deborah requested further assistance from DCS in
6 recovering past due maintenance for tax years 2001 and 2002.
7 In the administrative proceedings that followed, the ALJ
8 addressing tax year 2001 determined that Richard owed
9 \$55,948.74 for past due maintenance for that year. Another ALJ
10 determined in a later hearing that Richard owed \$39,944.60 for
11 tax year 2002. Both ALJs rejected Richard's claim that income
he reported on his tax returns for those years for IRA
distributions should be excluded from the maintenance
calculation. His claim was based, in part, on the argument
that the IRA was a fund awarded to him as part of the property
division of the dissolution decree. He essentially argues that
those proceeds cannot be used to calculate maintenance for
Deborah because they were awarded to him.

12 Importantly, the ALJs also rejected Deborah's request for
13 attorney fees. They also rejected her claim for interest on
the delinquent maintenance obligations from the times they
were due.

14 Richard sought review of the administrative decisions when he
15 petitioned for judicial review in King County Superior Court.
16 Deborah did not cross-petition for review of any part of
17 either ALJ ruling. However, several months after the final
18 order by the ALJ regarding tax year 2001, Deborah made
"counterclaims" for attorney fees and interest for the
delinquent maintenance obligations in her response to the
petition for review.

19 In September 2005, a superior court judge affirmed the
20 administrative determination regarding tax year 2001. That
21 judge also granted Deborah's request for awards of attorney
22 fees at both the administrative and judicial review levels,
imposed CR 11 sanctions against Richard and his counsel, and
awarded interest for the past due maintenance.

23 In December 2005, a different superior court judge affirmed
24 the administrative determination regarding tax year 2002 and
25 granted Deborah's request for interest on the past due
maintenance. In a later ruling, the same judge also granted
Deborah's requests for attorney fees at the administrative and
superior court review levels.

26 Richard timely appealed the superior court order denying the
27 petition for review and the order assessing attorney fees and
28 sanctions for the 2001 tax year matter. He also appealed the
order denying his petition for review and the order assessing

1 attorney fees for the 2002 tax year matter after the attorney
2 fees order was entered. We consolidated these appeals.

3 In re MacGibbon , 139 Wash. App. 496, 500-503, 161 P.3d 441 (Wash. App.
4 2007) (paragraph numbers and some footnotes omitted).

5 The Washington Court of Appeals reversed the award of attorney's
6 fees against debtor and vacated and remanded for reconsideration an
7 award of sanctions against him.

8
9 **B. Bankruptcies:**

10 There is more: debtor has filed three bankruptcy petitions, and
11 Ms. MacGibbon one, and all of the cases have been contentious.

12 Debtor Richard D. MacGibbon filed a chapter 11 case (No. 04-14951)
13 13 April 2004; that case generated three adversary proceedings between
14 the MacGibbons, as well as contested motions to convert and for relief
15 from stay brought by Washington's Department of Social and Health
16 Services ("DSHS") seeking to enforce spousal support, and was dismissed
17 approximately 15 months later on motion of the United States Trustee,
18 joined by DSHS; no plan had been proposed. During the pendency of that
19 bankruptcy, debtor and his current wife sold the house in Issaquah,
20 Washington, which had been awarded to him in the dissolution. His
21 bankruptcy counsel held the proceeds in trust, but remitted
22 approximately \$39,000 to DSHS, which paid it over to Ms. MacGibbon.
23 DSHS served an order to withhold and deliver (an administrative
24 garnishment under Washington law) on counsel, seeking the roughly
25 \$126,000 still held in his trust account.

26 Debtor's response was to file a chapter 13 case (No. 05-46148),
27 with the same counsel. DSHS moved to dismiss or require turnover of the
28 funds held by counsel. I dismissed the case because the debtor

1 scheduled over \$355,000 in non-contingent liquidated unsecured debts,
2 exceeding the debt limit of § 109(e).

3 Debtor then filed the present case (No. 05-47976), with the same
4 counsel, and again as a chapter 13. This time he listed non-contingent
5 liquidated unsecured debt in the amount of \$209,404.02, with no
6 explanation of the change in answer to question 10 (regarding transfers
7 within the last year) of his statement of financial affairs or
8 elsewhere. The State again moved for turnover of the funds held by
9 counsel or dismissal of the new case, and on 4 October 2005 I ordered
10 debtor and counsel to remit the funds to the State. That was done, and
11 the state paid those funds over to Ms. MacGibbon. The State objected to
12 confirmation of debtor's proposed plan, and the chapter 13 trustee moved
13 to dismiss or convert the case. Debtor obtained new counsel, who moved
14 for voluntary conversion of the case to chapter 7; I entered an order to
15 that effect 26 October 2005. Debtor has received his discharge, which,
16 of course, excepts nondischargeable debts.

17 Meanwhile Ms. MacGibbon had filed her own chapter 11 case in April
18 of 2005 (No. 05-15099), and she confirmed her plan in September of that
19 year. The source of funds to effectuate the plan was the Issaquah house
20 sale proceeds held in debtor's counsel's trust account. Debtor filed a
21 variety of claims, all of which were disallowed. He unsuccessfully
22 appealed both the denial of his motion to reconsider confirmation and
23 the order disallowing his claims. But Ms. MacGibbon did not fully fund
24 the plan: she spent approximately \$42,000 of the funds recovered from
25 Mr. MacGibbon's bankruptcy counsel's trust account, rather than apply it
26 to complete payments in accordance with her confirmed chapter 11 plan.
27 The United States Trustee moved to convert the case to one under
28 chapter 7, and the case was converted. The trustee sought to recover

1 the plan deficiency from debtor's ongoing payments, and on the trustee's
2 motion, the State was ordered to remit to the trustee 75% of the excess
3 of its collections from debtor over his child support obligations. The
4 trustee's objections to debtor's seven claims were sustained. No
5 appeals this round.

6
7 **C. Adversary Proceeding:**

8 In addition to the State's turnover motion recounted above, debtor
9 filed a variety of motions in this case, seeking, among other things, to
10 enjoin Ms. MacGibbon from engaging in supplemental proceedings,
11 abandonment of his malpractice cause of action against his attorneys,
12 seeking disbursement of funds held by the trustee, and opposing the
13 trustee's motion to disburse funds to DSHS for the benefit of Ms.
14 MacGibbon, with little success.

15 In February of last year, he filed this adversary proceeding
16 against Ms. MacGibbon and the trustee in her converted bankruptcy case.
17 He also filed motions to enforce the automatic stay, attempting to
18 preclude the State from enforcing his support obligation, which I
19 denied. Some of those issues have become part of this adversary
20 proceeding: debtor's initial complaint named Ms. MacGibbon and the
21 trustee in her converted case as defendants, and sought a determination
22 that his obligations to Ms. MacGibbon are dischargeable under
23 § 523(a)(5). The State, not a named defendant, responded with a motion
24 for summary judgment. After some procedural wrangling, the trustee was
25 dismissed, and the State was joined as a party in its capacity as the
26 collector of support on behalf of Ms. MacGibbon.

27 Debtor in his third amended complaint seeks a determination that
28 his obligation to pay maintenance in excess of the Base Support set

1 forth in the Decree is dischargeable on three grounds: first, that Ms.
2 MacGibbon's chapter 11 plan operated as an assignment of her right to
3 receive \$125,000 of the maintenance, and the order requiring the State
4 to pay over 75% of those funds to her trustee is an enforcement of that
5 assignment; second, that maintenance is really a dischargeable property
6 division, and, third, that to the extent that it is not, he lacks the
7 ability to pay it, and the benefit to him of discharge would outweigh
8 the detriment to Ms. MacGibbon. He also seeks a determination that Ms.
9 MacGibbon and the State violated the automatic stay through their
10 various collection actions, and that he has been damaged thereby.

11 I denied debtor's motions for a temporary restraining order which
12 echoed his earlier motion in the main case to enforce the automatic stay
13 (the object of both being to stop DSHS from enforcing the support
14 obligation), and the State was named as a party in debtor's third
15 amended complaint (docket no. 46). The State and Ms. MacGibbon
16 responded (docket nos. 56 and 58); I denied the State's motion for
17 summary judgment, as well as debtor's implicit cross motion for summary
18 judgment on the assignment issues.

19 I entered a pretrial order (docket no. 80) and an amended pretrial
20 order (docket no. 91) in which the parties agreed in extensive detail
21 regarding the Findings and Decree and the history of Ms. MacGibbon's and
22 the State's enforcement efforts and other post-dissolution proceedings,
23 as well as the economic situations of the parties. They also stipulated
24 to the admissibility of numerous exhibits, including their expert
25 declarations.

26 The able counsels' exemplary professionalism resulted in a very
27 short trial: the exhibits identified in the pretrial order were
28 admitted, and the only witnesses were debtor, Ms. MacGibbon, and a state

1 support enforcement officer who testified respecting the State's
2 collections and disbursements. After argument, I requested post-trial
3 briefs, and took the matter under submission.
4

5 **II. JURISDICTION**

6 These are core proceedings within federal bankruptcy jurisdiction,
7 28 U.S.C. § 157(b)(2)(I) and (O), referred to this court by General Rule
8 7 of the Local Rules, W.D. Washington.
9

10 **III. ISSUES**

11 A. Is debtor's obligation to pay Additional Support nondischargeable
12 under § 523(a)(5)?

13 B. If not, is it nondischargeable, in whole or in part, under
14 § 523(a)(15); and

15 C. Did the State and Ms. MacGibbon violate the automatic stay of § 362
16 when they assessed amounts owed under the dissolution decree, and
17 applied the amounts collected, after he filed his petition?
18

19 **IV. ANALYSIS**

20 In addition to the admitted facts set forth in the agreed amended
21 pretrial order (overruling debtor's objection to no. 13, and excluding
22 the others to which he objected, as none of them would be dispositive,
23 and the objections are thus moot), taking judicial notice of those
24 matters contained in this court's docket to the extent they are not set
25 forth in the pretrial order, FRE 201; In re Blumer, 95 B.R. 143, 146-47
26 (9th Cir. BAP 1988), and having considered the evidence at trial, I find
27 the facts recounted above in part I. FRBP 7052.
28

1 **A. Section 523(a)(5)**

2 The § 523(a)(5) exception to discharge strikes a balance
3 between competing policies. On the one hand, the goal of
4 providing a "fresh start" to the bankruptcy debtor requires
5 that exceptions to discharge be confined to those plainly
6 expressed. In re Klapp, 706 F.2d 998, 999 (9th Cir. 1983).
On the other hand, this court has recognized "an overriding
public policy favoring the enforcement of familial
obligations." Shaver v. Shaver, 736 F.2d 1314, 1316 (9th Cir.
1984).

7 In re Chang, 163 F.3d 1138, 1140 (9th Cir. 1998).

8 Prior to its amendment by BAPCPA, Section 523 provided:

9 (a) a discharge . . . does not discharge an individual debtor
10 from any debt –

11

12 (5) to a spouse . . . for alimony to, maintenance
13 for, or support of such spouse . . . in connection
with a . . . divorce decree or other order of a
court of record . . . but not to the extent that

14 (A) such debt is assigned to another
15 entity, voluntarily or by operation of
law . . . ; or

16 (B) such debt includes a liability
17 designated as alimony, maintenance, or
18 support, unless such liability is
actually in the nature of alimony,
maintenance, or support; . . .

19 Subparagraph B's nonsequitur, excepting from discharge a liability
20 "designated as alimony, maintenance, or support, unless such liability
21 is actually in the nature of alimony, maintenance, or support" (emphasis
22 added) has been construed to make sense, and the provision's accepted
23 meaning is that debts actually in the nature of alimony, maintenance, or
24 support are nondischargeable. As noted by the Ninth Circuit:

25 When determining whether a particular debt is within the
26 § 523(a)(5) exception to discharge, a court considers whether
the debt is "actually in the nature of . . . support."
27 Shaver, 736 F.2d at 1316. This question is a factual
determination made by the bankruptcy court as a matter of
28 federal bankruptcy law. In re Sternberg, 85 F.3d 1400, 1405
(9th Cir. 1996), rev'd on other grounds, In re Bammer, 131

1 F.3d 788 (9th Cir. 1997) (en banc). A relevant factor for the
2 bankruptcy court to consider when making this determination is
3 how the particular state law characterizes the debt. In re
Catlow, 663 F.2d 960, 962-63 (9th Cir. 1981).

4 Chang, 163 F.3d at 1140.

5 Debtor's fundamental premise in this adversary proceeding is that
6 the Additional Support resulting from the Decree's formula requiring him
7 to pay one-half of his gross income after federal income taxes and child
8 support as maintenance is not "actually in the nature of alimony,
9 maintenance, or support." As recounted in the Washington Court of
10 Appeals opinion quoted above, application of that formula generates
11 considerable obligations by including capital gains from the sale of the
12 property and retirement account distributions. He does not seek to
13 discharge his obligation to pay Base Support.

14 Although BAPCPA amended § 523(a)(5), and it now provides simply
15 that "domestic support obligation(s)" are not dischargeable,
16 § 101(14)(A) defines that term to mean a debt that is "in the nature of
17 alimony, maintenance, or support . . . ," so the issue of what
18 obligations are "in the nature of support" remains salient. Here, the
19 fundamental question is whether the provision establishing maintenance
20 entirely on the basis of the debtor's circumstances, without regard to
21 the absolute (as distinct from relative) current needs of Ms. MacGibbon,
22 is "actually in the nature of alimony, maintenance, or support."

23 Debtor has forcefully argued throughout these proceedings that the
24 answer to that question is "no." He argues, most recently in his trial
25 and post-trial briefs (docket nos. 79 and 81), that the formula operates
26 to redistribute property post-dissolution, and that the state trial
27 judge intended to do so, emphasizing her statement that the economic
28 situations going forward "warrant a permanent equalization of the

1 parties' adjusted and future standard of living through an award of
2 property, including maintenance." Findings, Section 2.12, at 6-7. He
3 argues that this result is inequitable, and contends that the Decree
4 effectively distributed 52.5% of the marital property to Ms. MacGibbon,
5 and that it is contrary to Washington law to distribute the property
6 equally and then award maintenance from the property distributed, citing
7 Marriage of Barnett, 63 Wn. App. 385, 388, 818 P.2d 1382 (1991), and
8 that his Additional Support obligation is not actually in the nature of
9 alimony, maintenance and support.

10 Debtor propounds the familiar principles that bankruptcy courts
11 determine whether an obligation is truly in the nature of support under
12 federal law, citing Chang, 163; In re Jodoin, 209 B.R. 132, 137-38 (9th
13 Cir. BAP 1997); and In re Gionis, 170 B.R. 675, 681 (9th Cir. BAP 1994),
14 and that substance, not form, and content, not labels, control, citing
15 In re Kritt, 190 B.R. 382, 388 (9th Cir. BAP 1995); and Jodoin, 209 B.R.
16 at 138, note 14. He argues from In re Myrvang, 232 F.3d 1116, 1123 (9th
17 Cir. 2000) that the bankruptcy court must break down an obligation into
18 its parts and analyze the dischargeability of each part separately.

19 He also asserts that there are three components to his maintenance
20 obligation: Base Support, one-half of his earned income, and one-half of
21 capital gains or proceeds on sale or distribution of property. Debtor
22 attempted to challenge the applicability of the formula to unearned
23 income in his second state appeal, but was precluded by his failure to
24 have done so in his first appeal. Exhibit D-8, p. 1. But, even if
25 Myrvang, a § 523(a)(15) case, were pertinent, no provision in the Decree
26 or Findings distinguishes between earned income and capital gains,
27 distributions from retirement accounts, or anything else which might be
28 within his gross income, and debtor seeks only to have the excess of his

1 obligation over the Base Support amount declared dischargeable. There
2 is no necessity to deconstruct his Additional Support debt here.

3 He continues:

4 When analyzing the dischargeability issue, it is
5 necessary to compare Mr. MacGibbon's obligation with Ms.
6 MacGibbon's need. "Need is one important factor. 'Support
7 payments tend to mirror the recipient spouse's need for
8 support.'"

9 FN13. Gionis, 170 B.R. at 682, citing, Shaver 736
10 F.2d at 1317; and In re Marriage of Edwards, 83 Wn.
11 App. 715, 722, 924 P.2d 44 (1996). See, also, In
12 re Gianakas, 917 F.2d 759, 762 (3rd Cir. 1990)
13 ("the court should examine the function served by
14 the obligation at the time of the divorce or
15 settlement. An obligation that serves to maintain
16 daily necessities such as food, housing and
17 transportation is indicative of a debt intended to
18 be in the nature of support." (Citations omitted).

19 Washington's state law is in accord.

20 FN14 In re Marriage of Luckey, 73 Wn. App. 201,
21 209. 868 P.2d 189 (1964) (maintenance is designed
22 to provide necessary support to the disadvantaged
23 spouse until he or she can become self
24 supporting.); and In re Marriage of Foley, 84 Wn.
25 App. 839, 845-46, 930 P.2d 929 (1993) (when
26 determining maintenance courts are strongly
27 governed by the needs of the receiving spouse.)

28 Here, Mr. MacGibbon does not contest Ms. MacGibbon is
entitled to maintenance equal to one-half his gross earned
income after he pays tax and child support and that this
amount is actually in the nature of support. This was the
amount approximated by the State court judge when she
estimated the maintenance and set the base maintenance rate.
This amount provided for Ms. MacGibbon's and the children's
needs after the divorce. [Debtor's expert] explains in his
testimony, a State trial judge is not going to leave the
disadvantage spouse's and children's needs to chance. The
ability to meet those needs is not going to be dependent upon
the payor spouse's discretion and control as to when, and if,
he sells property or receives a distribution.

The other non-dispositive factors show the portions of
the maintenance at issue are not actually in the nature of
support. The main factors a court needs to consider are "(1)
an absence of support payments in the decree, then (2) the

1 presence of minor children in the marriage and (3) a disparity
2 of income between the parties may serve as indicia of need."

3 FN15 In re Gionis, 170 B.R. at 682 citing Shaver,
4 736 F.2d at 1316.

5 "While a bankruptcy court may consider other factors, these
6 are the primary ones that inform the inquiry in this case."

7 FN16 Id.

8 Trial Brief, (docket no. 79 at 10:11-11:16) (emphasis in original).

9 He also contends that other factors also suggest the provisions in
10 question are not in the nature of maintenance or support: whether the
11 payments are made over a period of time or in a lump sum, and whether
12 the obligation terminates upon death or remarriage. Regarding the
13 requirement that he make a single payment of the extra amount owed,
14 debtor implies that this makes the payment a single lump sum, although
15 there have already been multiple annual assessments (which, in fact,
16 triggered this particular dispute). He also notes nothing in the Decree
17 or Findings terminates on his death, or Ms. MacGibbon's death or
18 remarriage, but asserts incorrectly that he is required to have life
19 insurance to pay the obligation, so it would survive his death and
20 become a lien upon his estate. But that provision in section 3.7 of the
21 Decree (at 5:10-13) pertains only to Base Support. Finally, he argues
22 that the state court's label and the fact that he has treated the
23 payments on his tax returns as deductible alimony or maintenance are
24 minor factors, and that In re Kritt, 190 B.R. at 388-389, stands for the
25 proposition that his tax returns do not create a quasi-estoppel. He did
26 not pursue the assignment theory at trial, nor was it listed for
27 decision in either pretrial order, or briefed in his trial or post-trial
28 briefs.

1 Ms. MacGibbon³ responds, in trial and post-trial briefs (docket nos.
2 78 and 82), agreeing in every important respect regarding the principles
3 to be derived from the authorities, but vigorously disputing debtor's
4 application of those principles to the facts at hand, and noting:

5 Where, as here, the award was made in a contested proceeding,
6 the intent of the state court trial judge is dispositive in
7 determining the nature of the award. Gionis v. Wayne (In re
8 Gionis), 170 B.R. 675, 682 (9th Cir. BAP 1994), aff'd, 92 F.3d
1192 (9th Cir. 1996). See also In re Jodoin, 209 B.R. 132,
138 (9th Cir. BAP 1997). As explained by Chief Judge Pappas
in In re Kimball, 253 B.R. 920, 923 (Bankr. Id. 2000):

9 Because this Court is primarily concerned with
10 discerning the intent of the state court judge in
11 characterizing the various obligations imposed upon
12 Defendant in the divorce action, it is the state
court's formal Findings, Conclusions, and Decree
that are the primary focus of this Court's inquiry.

13 The relevant time period for the inquiry is the time when the
14 order was entered. In re Seixas, 239 B.R. 398, 402 (9th Cir.
BAP 1999).

15

16 According to the Ninth Circuit, the foremost consideration in
determining if a debt is in the nature of support is:

17 whether the recipient spouse actually needed
18 spousal support at the time of the divorce. [cite
19 omitted] In determining whether spousal support was
20 necessary, the trial court should examine if there
was an "imbalance in the relative income of the
parties" at the time of the divorce decree [cite
omitted] In re Sternberg, 85 F.3d at 1405.

21 The single most important factor in the MacGibbon dissolution
22 was the significant disparity in the parties' incomes.
23 Richard was an airline pilot who earned \$190,000 per year and
24 anticipate increased earnings, while Deborah was responsible
for the care of the parties' five children, had not worked
since she married Richard, and was to all intents and purposes
unemployable.

26 ³ Although Ms. MacGibbon filed her own answer and participated
27 without counsel at trial, she did not file briefs or argue separately;
28 the defense battle was primarily waged by the State; for convenience I
refer henceforth to the defendants collectively as "Ms. MacGibbon" in
discussing their legal arguments.

1 Trial Brief, Doc. No. 79, at 3-4.

2 Respecting other factors, she argues that Kritt allows a party's
3 tax treatment of the obligation, as well as the state law's
4 characterization, as factors to be considered, citing Chang, 163 F.3d at
5 1140. She notes that under Washington law support obligations are
6 modified and property awards are not, citing (via her expert's
7 declaration, D-1 at 7:20) In re Little, 96 Wn. 2d 183, 634 P.2d 498
8 (1981), and RCW 261.09.170, and that debtor has twice sought to modify
9 the obligation at issue.

10 Further, in Washington law, support orders can be enforced via
11 contempt, while property awards not reasonably related to support
12 cannot, citing Decker v. Decker, 52 Wn. 2d, 456, 465, 326 P.2d 332
13 (1958); In re Marriage of Young, 26 Wn.App. 813, 615 P.2d 508 (1980),
14 and the state court has done so here. Exhibit P-3.

15 Finally:

16 Washington law, RCW 26.09.170(2), provides as follows: "Unless
17 otherwise agreed in writing or expressly provided in the
18 decree the obligation to pay future maintenance is terminated
19 upon the death of either party or the remarriage of the party
20 receiving maintenance." Since the Divorce Decree is silent
regarding the death or remarriage of Deborah MacGibbon,
maintenance terminates if she remarries or dies. Such
language indicates a support obligation. Exhibit D-1, Hall
Declaration, p. 8, lines 8-11; In re Shaver, 736 F.2d at 1316.

21 Trial Brief, Doc. No. 78, at 6.

22 So, the question: is income-equalization independent of the
23 recipient ex-spouse's current need "in the nature of support?"

24 First, some underbrush must be cleared: to the extent debtor's
25 contentions are that the dissolution court awarded maintenance
26 improperly as a matter of Washington law, or that the operation of the
27 Decree's formula redistributes property contrary to state law, or that
28 it was simply a mistake because it predicates maintenance on income

1 derived from the sale or other use of property awarded to him in the
2 Decree, his arguments run afoul of the domestic relations exception to
3 federal jurisdiction. The Supreme Court has clarified that "'divorce,
4 alimony, and child custody decrees' remain outside federal
5 jurisdictional bounds," Marshall v. Marshall, 547 U.S. 293, 308 (2006)
6 (citing Ankenbrandt v. Richards, 504 U.S. 689, 703-704 (1992)). And
7 federal courts must give state court judgments the same preclusive
8 effect as do the courts of the state wherein the judgment was rendered.
9 See 28 U.S.C. § 1738, the Full Faith and Credit statute, and In re
10 Nourbakhsh, 67 F.3d 798, 801 (9th Cir.1995).

11 Secondly, it transgresses the Rooker-Feldman doctrine: the Supreme
12 Court is the only federal court which may review an issue determined in
13 or "inextricably intertwined" with a previous action in state court
14 between the same parties. See D.C. Court of Appeals v. Feldman, 460 U.S.
15 462, 486 (1983) (district court does not have jurisdiction "over
16 challenges to state court decisions in particular cases arising out of
17 judicial proceedings even if those challenges allege that the state
18 court's action was unconstitutional"); Rooker v. Fidelity Trust Co., 263
19 U.S. 413, 415-16 (1923) (state court ruling on federal constitutional
20 questions in the state court action could not be modified or reversed by
21 district court). In Exxon Mobil v. Saudi Basic Inds. Corp., 544 U.S.
22 280, 284 (2005), the Court held that Rooker-Feldman is a narrow
23 doctrine, confined to "cases brought by state-court losers complaining
24 of injuries caused by state-court judgments rendered before the district
25 court proceedings commenced and inviting district court review and
26 rejection of those judgments."

27 In Washington, res judicata (claim preclusion) prevents
28 relitigation of a claim when it is identical to the claim in the prior

1 action in four respects: "(1) subject matter; (2) cause of action; (3)
2 persons and parties; and (4) the quality of the persons for or against
3 whom the claim is made." Rains v. State, 100 Wash. 2d 660, 663, 674 P.2d
4 165, 168 (1983). If the parties are identical, the quality of the
5 persons is also identical. Id., at 664.

6 Collateral estoppel (issue preclusion) in Washington courts
7 requires: "(1) identical issues; (2) a final judgment on the merits; (3)
8 the party against whom the plea is asserted must have been a party to or
9 in privity with a party to the prior adjudication; and (4) application
10 of the doctrine must not work an injustice on the party against whom the
11 doctrine is to be applied." Hadley v. Maxwell, 144 Wash. 2d 306, 311, 27
12 P.3d 600, 602 (2001) (internal quotation omitted).

13 So the state law issues regarding propriety of the provisions and
14 their operation are not before me, because they deal with issues of
15 alimony and maintenance in the first instance, rather than their
16 dischargeability or not under federal bankruptcy law. They are within
17 the domestic relations exception, and because those issues were finally
18 decided in the state courts before the filing of this adversary
19 proceeding (and this bankruptcy), the Rooker-Feldman doctrine also
20 prevents review here. Finally, I must apply Washington's preclusion
21 rules, and all of the elements of both issue and claim preclusion are
22 present.

23 That leaves the federal issue of dischargeability. In the Ninth
24 Circuit's words, "[i]n determining whether a debtor's obligation is in
25 the nature of support, the intent of the parties at the time of the
26 settlement agreement is dispositive." Sternberg, 85 F.3d at 1405.
27 Where, as here, the obligation was created in a state court's judgment,
28 it is the intent of the trial judge which is relevant. Gionis, 170 B.R.

1 682; Jodoin, 209 B.R. at 138. And it is unmistakably clear that the
2 dissolution court judge here intended to create a support obligation
3 when she entered the Findings and Decree.

4 Although it is tempting in light of the Ninth Circuit's statement
5 in Sternberg that "intent . . . is dispositive," 85 F.3d at 1405, to go
6 no further, since the other factors here weigh heavily in favor of
7 characterizing the Additional Support as "actually in the nature of
8 alimony, maintenance, and support," I need not rely on the single fact
9 that the dissolution court judge intended to create a support
10 obligation.

11 The Decree's provisions operate to equalize the relative incomes of
12 the parties and thus their comparative need, the payments extend over a
13 number of years, and the obligation will terminate upon the death of
14 either party or the remarriage of Ms. MacGibbon, RCW 26.09.170(2). Mr.
15 MacGibbon has, by seeking modification of the provisions and his
16 characterization of his payments on his tax returns, treated the
17 obligation as maintenance or support. While the latter points do not
18 strictly estop him from making the argument, they are evidentiary
19 considerations which weigh against him. Finally, both the Washington
20 Court of Appeals in its opinions, and the family court in enforcing the
21 Additional Support provisions via contempt, show that state law
22 characterizes those provisions as maintenance.

23 Taking all of these factors in conjunction with the primacy of the
24 state court's intent at the time the Decree was entered, the Additional
25 Support obligation appears to be in the nature of support. There
26 remains the final question of whether, for an obligation to be "in the
27 nature of alimony, maintenance, or support," that obligation must be
28 based strictly on absolute need, rather than the relative economic

1 situations of the parties. I think not – had Congress intended such a
2 requirement, it could easily have created one by using language in
3 § 523(a)(5) paralleling that which it used in framing the reciprocal
4 exemption: a debtor may exempt the "right to receive –

5 . . .

6 alimony, support, or separate maintenance, to the extent
7 reasonably necessary for the support of the debtor and any
8 dependent of the debtor; . . ."

8 Section 522(d)(10)(D) (emphasis added).

9 Giving meaning and import to every word in a statute, as I must,
10 Negonsott v. Samuels, 507 U.S. 99, 106 (1993), and presuming that
11 "Congress acts intentionally and purposefully when it includes
12 particular language in one section of a statute but omits it in
13 another," as I must, BFP v. Resolution Trust Corp., 511 U.S. 531, 537
14 (1994), I can only conclude that Congress established no requirement of
15 actual need. And it would be incongruous and unseemly, given that
16 debtor's income was almost \$200,000 per year when the decree was
17 entered, and still exceeds \$150,000 per year, to read the § 523(a)(5)
18 exception to discharge as extending only to strict necessities when the
19 language of the statute does not compel that.

20 Accordingly, I find that the obligations at issue are in the nature
21 of alimony, maintenance and support, and are nondischargeable under
22 § 523(a)(5).

23
24 **B. Section 523(a)(15)**

25 As debtor's obligation to pay the Additional Support is
26 nondischargeable under § 523(a)(5), the question of nondischargeability
27 under § 523(a)(15) is moot.

1 **C. Automatic Stay**

2 Section 362(b) provided, pre-BAPCPA, that:

3 The filing of a petition under section 301, 302, or 303
4 of this title, . . . does not operate as a stay-

5

6 (2) . . .

7 (A) of the commencement or continuation of an action or
8 proceeding for-

9 . . .

10 (ii) the establishment or modification of an order for
11 alimony, maintenance, or support; or

(B) of the collection of alimony, maintenance, or support from
property that is not property of the estate[.]

12 In the Ninth Circuit's words:

13 Section 362(b)(2)(A)(ii) was added to the bankruptcy code in
14 1994. Bankruptcy Reform Act of 1994, Pub.L. No. 103-394 § 304
15 (1994). The 1994 reforms were designed to "provide greater
16 protection for alimony, maintenance, and support obligations
17 owing to a spouse, former spouse or child of a debtor in
18 bankruptcy." H.R. Rep. No. 103-835, at 54 (1994), reprinted in
19 1994 U.S.C.C.A.N. 3363. "[A] debtor should not use the
protection of a bankruptcy filing in order to avoid legitimate
marital and child support obligations." Id. Addition of this
provision was among a series of changes that included limiting
debtors' ability to discharge debt relating to spousal
support, 11 U.S.C. § 523(a)(15), and creating new bankruptcy
priority for such debt, 11 U.S.C. § 507(a)(7).

20 The import of § 362(b)(2)(A)(ii) is consistent with our prior
21 precedent counseling "bankruptcy courts to avoid incursions
22 into family law matters...." Mac Donald v. Mac Donald (In re
Mac Donald), 755 F.2d 715, 717 (9th Cir.1985) (affirming
bankruptcy court's grant of relief from stay to pursue
modification of spousal support action).

23 Here, § 362(b)(2)(A)(ii) covers the modification request.
24 Specifically, Jacqueline sought to modify the existing support
25 order on grounds that she incurred "extraordinary uninsured
26 health costs." Although her medical needs arose as a
27 consequence of the alleged assault by Christopher, medical
28 expenses are typically encompassed within the rubric of
spousal support. Thus, Jacqueline's modification request is
squarely within the plain meaning of "the commencement ... of
an action or proceeding for ... an order for alimony,
maintenance, or support."FN4 11 U.S.C. § 362(b)(2)(A)(ii).

1 FN4. In the same filing, Jacqueline also
2 requested a determination with respect to unpaid
3 spousal support arising from Christopher's
4 employment in Montana. The motion to lift the stay
5 was properly denied as to this claim. Because the
6 claim was embraced within the Plan, and because it
7 related to property of the estate, the claim did
8 not fall within the § 362(b)(2)(B) exemption, which
9 covers support collection "from property that is
10 not property of the estate."

11 Allen v. Allen, 275 F.3d 1160, 1163 (9th Cir. 2002).

12 Here, all of the actions debtor complains of were excepted from the
13 stay by § 362(b)(2): the assessments were to determine the amount of
14 his Additional Support obligations, and the collections were directed
15 against his exempt retirement plans, not property of the estate.
16 § 522(c)(1); In re Lopez, 224 B.R. 439 (Bankr. N.D. Cal. 1998). See
17 Owen v. Owen, 500 U.S. 305, 308 (1991) (an exemption is an interest
18 withdrawn from the estate).

19 Neither Ms. MacGibbon nor the State violated the automatic stay.

20 V. CONCLUSION

21 Debtor's Additional Support obligation is nondischargeable under
22 § 523(a)(5), which renders moot the question of its dischargeability
23 under § 523(a)(15).

24 Neither the State nor Ms. MacGibbon violated the automatic stay of
25 § 362.

26 I will enter a separate judgment.

27 **/// - END OF DECISION - ///**



Philip H. Brandt
United States Bankruptcy Judge
(Dated as of "Entered on Docket" date above)

1
2 CERTIFICATE OF SERVICE:
3 I CERTIFY I SERVED COPIES OF
4 THE FOREGOING (VIA U.S. MAIL,
FACSIMILE, OR ELECTRONICALLY) ON:

5 Dennis J. McGlothlin
6 Email: dennis@olympiclaw.com
(Richard D. MacGibbon)

Jeffrey B. Wells
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9 Deborah J. MacGibbon
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12 1325 4th Ave, Ste 940
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Deborah J. MacGibbon
20408 NE 7th Court
Sammamish, WA 98074

14 DATE: 3 March 2008

15 BY: /s/ Suzan Gallup
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